

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

WILLIAM H. NELSON AND
BILLIE JO NELSON

PLAINTIFFS

V.

NO. 2:97CV239-B

FIRST LENDERS INDEMNITY COMPANY,
ROBERT CRITES AND BANK ONE
DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court on the plaintiffs' motion to remand and defendant Bank One's motion to transfer. The court has duly considered the parties' motions, memoranda and exhibits.

This cause was removed on the grounds of 28 U.S.C. § 1334(b) ("district courts shall have original...jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11") and 28 U.S.C. §1452(a) (allowing removal of a cause of action under section 1334). The amended complaint alleges that defendant Robert Crites, as agent for defendant First Lender's Indemnity Company [F.L.I.C.], and F.L.I.C. executed a commercial promissory note in favor of the plaintiffs in the sum of \$35,000 and defaulted. The plaintiffs seek actual damages in the sum of \$35,863.00¹ plus interest against Crites and F.L.I.C., jointly and severally, for default and punitive damages against Crites and F.L.I.C. for fraud and/or misrepresentation. The amended complaint alleges that the note was to be secured by defendant Bank One, as trustee, and that Crites and F.L.I.C. failed to turn the plaintiffs' investment over to

¹This amount includes \$35,000 in principal and accrued interest.

Bank One. The amended complaint seeks actual damages in the sum of \$35,000 plus interest from Bank One, as trustee, for negligence and breach of fiduciary duty.

It is undisputed that F.L.I.C. is a debtor in a bankruptcy action pending in the United States Bankruptcy Court for the Central District of California, Cause No. Sa 97-16576-L-R. After the removal of this cause, the plaintiffs filed a stipulation dismissing F.L.I.C. without prejudice.² The plaintiffs assert that their stipulation was filed upon learning of the pending bankruptcy action against F.L.I.C. and that their causes of action against defendants Crites and Bank One should proceed in state court. Bank One opposes the motion to remand and moves to transfer this cause to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1412 ("A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties."). Under 28 U.S.C. § 157(a), a "district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."

Bank One asserts that this action was filed in violation of the automatic stay of the Bankruptcy Code, 11 U.S.C. § 362(a), and that the remaining claims constitute a core proceeding under section 157. Bank One contends that the claim against it is entirely based on the alleged acts of F.L.I.C. and that a judgment against F.L.I.C. would trigger an indemnification claim against the debtor's estate. The plaintiffs contend that they are not seeking from Bank One the

²Since the claim against a debtor in a bankruptcy proceeding, alleged in the amended complaint, invoked subject matter jurisdiction, the removal was proper. See Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 265 (5th Cir. 1995) ("general rule that removal jurisdiction should be determined on the basis of the state court complaint at the time of removal"). The issue is whether the remaining claims should be remanded to state court or determined in the bankruptcy court.

amount due on the note but rather damages for failing to protect them in their capacity as noteholders. The court finds the plaintiffs' argument unpersuasive for purposes of ruling on the motion to transfer. It appears to the court that the claims against Crites, as F.L.I.C's agent, as well as the claim against Bank One should be transferred for referral to the appropriate bankruptcy court to determine whether it should hear and determine these claims.³ See In re Wedlo, Inc, 212 B.R. 678 (Bankr. M.D. Ala. 1996); In re Convent Guardian Corp., 75 B.R. 346 (Bankr. E.D. Pa. 1987).

For the foregoing reasons, the court finds that the motion to transfer should be granted and that this cause, including the motions to remand and to dismiss⁴, should be transferred to the United States District Court for the Central District of California⁵ for the purpose of referral to the bankruptcy court. An order will issue accordingly.

THIS, the _____ day of May, 1998.

NEAL B. BIGGERS, JR
UNITED STATES DISTRICT JUDGE

³The notice of removal states that Bank One consents to entry of final orders or judgment by the bankruptcy court in the event the claim against it is deemed a non-core proceeding.

⁴Bank One has filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

⁵See 28 U.S.C. § 1409.